It is respectfully suggested that the clear prohibition of Rule 34 cannot be evaded by the ingenious method employed by the petitioner here. If a petitioner can evade it simply by circumventing the Clerk's office, then Rule 34 has no practical meaning whatever.

Moreover, the petitioner's arguments are hardly entirely frank. Petitioner says that the delay in filing was due to an Act of God, and not to excusable or inexcusable neglect. However, it appears from the affidavit of Richard Franks, sworn to on February 3, 1966, in Essex County, New Jersey, accompanying the application, that the petition was mailed from New York on the afternoon of January 31st, the day before the expiration of the period, by Fourth Class mail, Special Delivery. Although in the ordinary course of events First Class mail from New York to Washington will be delivered the day after mailing, we have been advised by the New York Post Office that Fourth Class mail from New York to Washington requires from one to three days. Therefore, even if there had been no unusual delays in the mails, petitioner had no assurance that the petition would be delivered in time. Clearly, it was negligent in not having the petition delivered personally on February 1st or at least requiring that the petition be sent by First Class mail on January 31st. The additional cost of mailing First Class rather than Fourth Class is relatively insignificant. The petitioner might also have inquired of the Clerk's office on the morning of February 1st (as in fact it did on February 3rd) and, upon being advised that the petition had not been received, could have delivered it personally later that

day. Yet, the application makes it clear that no such inquiry was made until two days after the period had expired. There can be no serious denial that this, too, constituted neglect.

The snowstorm, upon which petitioner relies as an "Act of God" only made the petitioner's neglect more flagrant. The snowstorm actually commenced on Saturday, January 29th, and by Sunday evening there were obviously serious delays and cancellations of transportation into and out of Washington. These delays continued through Monday morning, January 31st. These delays were reported on the front pages of New York newspapers on Monday morning. At that time the petition had not yet been mailed. Surely the petitioner was then on notice that it must take positive measures to insure that the petition would be delivered on time. And it could have taken any one of the following measures: It could have insured that the petition was mailed by First Class mail. It could have arranged for personal delivery. It could have inquired of the Clerk's office on the morning of February 1st. And finally, it could have applied to the Court under Rule 34 (before February 1st) for a short extension of time in view of the by then plain likelihood of transportation delays. Any one of these simple and obvious precautions would have eliminated the possibility of late filing, but the petitioner took none of them. It cannot now seriously claim that it was not guilty of even excusable neglect. It was certainly guilty of neglect, and, under the circumstances, of inexcusable neglect. The petition should be denied as untimely filed.

POINT II

No conflict exists between the decision of the Court of Appeals and the decision of this Court in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411.

The petitioner's sole argument for review of the decision of the Court of Appeals for the Ninth Circuit by this Court is that " . . . the unexplained conclusions of the Court below conflict in principle with the rationale of *Southwestern* [*Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, (1959) 360 U. S. 411] and confuse the precedential effect of that case" (Petition, p. 11). All of the petitioner's other arguments proceed from the assumption that such a conflict exists.

Whether a conflict "in principle" is sufficient to move this Court to grant certiorari is questionable; but in any event it is clear that the conclusions of the Court of Appeals with respect to *Southwestern* were not "unexplained," nor is there any conflict, in principle or otherwise, between the Court of Appeals' decision on the specific facts of this case and what was held by this Court in *Southwestern*.

In *Southwestern* the respondent, a water carrier certificated under the Interstate Commerce Act, had filed certain tariffs containing an exculpatory clause[1] with the Interstate Commerce Commission. That

[1] The words "exculpatory clause" are used in this brief to refer both to the exculpatory clause and to the indemnification agreement.

clause was incorporated by reference in a bill of lading issued by the respondent to the petitioner. The petitioner sued to recover damages for the loss of its barge, which had been towed by the respondent. The respondent pleaded the exculpatory clause as a complete defense. The petitioner argued that under the decision of this Court in *Bisso* v. *Inland Waterways Corporation,* 349 U. S. 85 (1955), the exculpatory clause was invalid as against public policy.

In *Southwestern* the Court noted that there was a factor in that case not present in *Bisso*: that the towboat's rates were " . . . at all times subject to regulatory control, prospectively and by way of reparation" by the Interstate Commerce Commission; and that the Commission, in setting the rates, may have compensated for the risk-shifting effect of the exculpatory clause. The Court therefore directed that the parties be given time in which to permit the Interstate Commerce Commission to indicate whether this rather intricate factor was considered in the establishment of the tariff there in question, pointing out, however, that the ultimate question of validity remained with the Court (360 U. S. at 420).

The specific question presented in *Southwestern* was " . . . whether considerations of public policy . . . are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body," (360 U. S. at 417), and this Court noted that "The rule of *Bisso,* however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is effectively controlled by a pervasive regulatory scheme" (360 U. S. at 418).

The *rationale* of *Southwestern,* therefore, is that where a regulatory body is charged with, and has the expertise to exercise, control over the rates charged by a carrier subject to its jurisdiction so as to preclude the power to drive hard bargains, it may well feel, in the exercise of that function, that economic factors may justify an exculpatory clause, and override otherwise valid considerations of public policy vis-a-vis hard bargaining.

The essential difference between this case and *Southwestern* is that in this case there was no tariff filed with the Interstate Commerce Commission or with any other regulatory body as such. There was no "expert administrative body" charged with control over the rates charged by the petitioner here. There was, in fact, no expertise available, as there was in *Southwestern,* to consider all the economic factors which might justify an exculpatory clause. The F.A.A., unlike the I.C.C., acted solely as a landlord, and not as a regulatory body. As the District Court found (F.F. #39) and as the Court of Appeals specifically pointed out (351 F. 2d at 257), the schedule of rates for Shemya Airport was not "effectively controlled by pervasive regulatory scheme."

This conclusion is amply justified both by the statutes involved and by the record below.

The statutory language which Northwest contends establishes a "pervasive regulatory scheme" by which the economic impact of an exculpatory agreement could be evaluated is found in 49 U.S.C.A. § 1159 (a), quoted at page 3 of the petition. That language should be compared with the language of the statutes

which set forth the functions, duties and powers of the Interstate Commerce Commission, relating to carriers by water *only,* as set forth by this Court in footnote 7 to its *Southwestern* opinion.

There, this Court first indicated the *scope* of the Commission's regulatory power in this area by citing 49 U.S.C.A. § 902 (d), where "common carrier by water" is defined. It may be seen that the scope of regulation contemplated by the section and hence by this Court is extremely broad.

The Court then indicates the *depth* or *extent* of the regulation by citing portions of Sections 906 and 907 of Title 49.

It easily may be seen that in *Southwestern* this Court had before it a regulatory arrangement which went to virtually the entire interstate towing industry and which was empowered to examine the economic impact of its decisions in great depth. The distinction between that "pervasive regulatory scheme" and the functions of the F.A.A. with regard to the Shemya Airport rates is very readily apparent. The language of 49 U.S.C.A. § 1159 (a) simply was never intended to create a "pervasive regulatory scheme."

In that regard, the attention of this Court is respectfully directed to the legislative history of the International Aviation Facilities Act, 49 U.S.C.A. §§ 1151 et seq., where it is stated that:

> "It should be pointed out that this legislation relates only to the acquisition and managing of airports, airways and associated services by the Administrator or the Chief of the Weather

Bureau" U.S. Code Congressional Service, 80th Congress, 2d Session, 1948, at page 1809.

It is difficult to discern any intent to create "regulatory" power over landing fees in such language. The Administrator has the power to contract, as he did, but not to "regulate" in the sense in which the term was used by this Court in *Southwestern.* The evidence adduced at the trial from former F.A.A. employees vividly demonstrates that the F.A.A. had no rate-regulating capability, and that specifically in the case of Shemya Airport it in fact performed no such function.

James D. Hill, who from 1959 to 1962 was associate general counsel of the F.A.A. and who from April, 1962, through October, 1963, served as Deputy General Counsel of the F.A.A., testified as follows:

> "Q. Now I think you mentioned that there were approximately 46,000 people employed by F.A.A. A. Yes.
>
> Q. Can you tell me approximately how many of these people are involved in the regulation, the economic regulation of either rates or routes and things of that sort? A. None. That is not a function of the Agency." (Tr. 17)
>
> * * * *
>
> "Q. Can you tell me approximately how many airports there are in the United States? A. Over 8,000.
>
> Q. Can you tell me how many of these airports have their tariffs or their rates, their landing fees, schedules of charges, what have you, regulated by the F.A.A.? A. Only those which

the Agency owns itself, in which it acts as a proprietor. That would be Washington National Airport, Dulles International Airport, and Cold Bay, Alaska.

Q. Aside from those does the F.A.A. regulate the charges at any airports? A. No. It has no authority to do that. It does not do that, it has never done that." (Tr. 20, 21)

* * * *

"Q. I think you mentioned that in certain instances the F.A.A. had set rates for its own airports, is that correct? A. Yes, sir.

Q. Does the F.A.A. have within its organization a branch which is devoted to the economic study of these rates? A. No, sir.

Q. Is there any provision within the F.A.A. for an economist or for any great specialist, any tariff specialist of any kind to look at these rates? A. No, sir. That is not one of the functions of the Agency so it has no rate-making section. Although of course I don't know all of the 46,000 employees. I have never met a rate-making specialist in the Agency." (Tr. 38)

Chris Lample, a civil and electrical engineer, was employed by the F.A.A and its predecessor agencies for more than 35 years. Between the years 1953 and 1963 he served as Assistant Director of Facilities and Materiel. He personally handled the leasing of Shemya to Northwest. Throughout the period relevant to this case, most of the recommendations to the Administrator of the F.A.A. which related to airports in Alaska came from Mr. Lample (Tr. 52). He testified, in part:

"Q. Do you, Mr. Lample, have any training or background in economics or economic regulation in the sense of rate-making or tariff regulations? A. Tariff regulation. None whatever.

Q. Do you consider yourself to be in a position to evaluate the economic impact of an indemnity provision?

Mr. Boochever: I am again going to object. I don't see that what he considers himself to be has any bearing on this case at all. His personal opinion as to whether he can evaluate an indemnity provision seems to me is calling for an opinion of the witness as to his own abilities.

Mr. Bradley: I think if the witness answers yes, you may be right, Mr. Boochever, but if he answers no it may be quite meaningful.

The Court: I will overrule the objection.

By Mr. Bradley:

Q. Do you consider yourself to be in a position to evaluate the economic impact of an indemnity provision, sir? A. No." (Tr. 49, 50)

* * * *

"Q. Do you recall reviewing a schedule of charges for Shemya Airfield? A. Yes.

Q. Was this schedule of charges that you reviewed—let me ask you first, how many schedules of charges did you review? A. There was an original, and a request for an increase, and a request for a second increase. Three.

Q. You reviewed three. Now we recognize that it was a long time ago and that it's difficult to recall specifics, but can you tell me whether the

procedures that were followed, what happened with regard to these reviews, was approximately the same with regard to all three, or were there substantially different procedures followed with regard to each? A. It was the same, the same method of procedure.

Q. From whom did you receive the schedules of charges? A. These came from the Regional Administrator in Anchorage.

Q. Is what you are saying true in each case? A. Yes.

Q. To whom did these first come for review in Washington? A. To me.

Q. Did you recommend approval of the schedules of charges? A. Yes, sir.

Mr. Boochever: Excuse me. I am going to object. Whether a subordinate recommends or does not recommend is not relevant. It's the action of the Department that counts. And I move the answer be stricken.

The Court: Overruled.

By Mr. Bradley:

Q. Now to the best of your knowledge did anyone other than yourself review the schedules of charges before they went to the Administrator? A. No.

Q. In recommending approval of the schedule of charges for Shemya, in each case, did you take into account the economic effect of any indemnity provisions? A. No. I had no knowledge of this at all.

Q. When you recommended approval or at the time you deliberated, did you take into considera-

tion the possibility that as a result of an indemnity provision danger to people on aircraft might result? A. No. That didn't occur to me at all. That wouldn't have come into the picture at all as far as I was concerned." (Tr. 52-54)

The conclusion that the F.A.A.'s "approval" of Shemya rates was the act of a landlord exercising a reserved right to approve rates charged by its tenant, and not part of any "pervasive regulatory scheme," is inescapable.

POINT III

Even if the rule of the *Southwestern* case should be held to be applicable to the facts of this case, the Court below was correct in holding the clause to be invalid and unenforceable.

Even if it is assumed that the Federal Aviation Agency, under the circumstances of this particular case, was empowered to, and did, exercise such complete regulatory control over the charges to be made by Northwest Airlines for the use of Shemya Airport that the case falls within the *Southwestern* doctrine, and if it is further assumed that the F.A.A. "approved" the schedule of charges after having taken into consideration the exculpatory clause and economic factors which might make the inclusion of that clause "reasonable," it most certainly does not follow that the Court of Appeals erred in declaring it invalid nevertheless.

We start with the proposition that, as this Court

itself pointed out in *Southwestern Sugar Co.* v. *River Terminals Corp.*, (1959) 360 U. S. 411, 420:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution."

We also know that this Court has specifically approved a "judicial rule" invalidating exculpatory clauses where such clauses would have a tendency to encourage negligence on the part of the exculpatee, or where one of the parties is in a position to drive a hard bargain. *Bisso* v. *Inland Waterways Corp.* (1955) 349 U. S. 85; *Boston Metals Co.* v. *The Winding Gulf*, (1955) 349 U. S. 122; *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, (1963) 372 U. S. 697. In the *Bisso* case, this Court noted that (349 U. S. at 91):

> ". . . The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

The second of these "two main reasons" was held not necessarily applicable in *Southwestern*, because ". . . so long as the towboat's rates are at all times subject to regulatory control, prospectively and by way of reparation, the possibility of an overreaching . . . can be aborted by the action of the I.C.C." (360 U. S. at 418).

We have already noted under Point II that in this case the F.A.A. had no power of "regulatory control, prospectively and by way of reparation," to prevent overreaching, or, if it did, that it had no means of exercising that power and, in fact, did not even consider the economic effect of the exculpatory clause.

The other "main reason" for the *Bisso* rule—"to discourage negligence by making wrongdoers pay damages"— was not discussed at any great length in *Southwestern.* However, it is difficult to imagine an operation which would justify the maintenance of a high standard of care more than an aircraft landing field.

Justice Black, speaking for a majority of the court, said in *Bisso*:

> "The dangers of modern machines make it all the more necessary that negligence be discouraged." *Bisso* v. *Inland Waterways Corp.,* 349 U. S. at 91.

With only one person in a slow-moving aircraft, the argument for a properly maintained landing field is strong. With present day aircraft carrying literally hundreds of persons at speeds nearly equal to the speed of sound, the argument for airport care becomes very nearly overwhelming.

In this case, Northwest was in complete and unquestioned control of the situation, as far as landing facilities were concerned; Alaska had no control whatever. If the exculpatory clause is valid, Northwest has no incentive whatever even to take reasonable pre-

cautions with respect to the safety of its field for aircraft using its facilities.

Suppose that Northwest's employees negligently parked a gasoline truck on a runway and negligently failed to remove it or to illuminate it, before dark, even though they knew that an airplane was scheduled to land on that runway. Suppose, further, that, as a result, the airplane crashed into the truck, and the truck, the airplane, and everybody and everything on board were consumed by fire: If the exculpatory provision is valid, Northwest could view the situation with equanimity, knowing that the airplane operator would not only have to reimburse it for the loss of the truck, and to bear the loss of its own airplane, but also would have to hold Northwest harmless from the claims presented by the deceased passengers' representatives, by the owners of the cargo, and by the owners of any property destroyed on the ground.

Even if, viewed from a strictly economic viewpoint, the exculpatory clause was justifiable—and there is no evidence that any such view was taken—it seems abundantly clear that public policy could not conceivably countenance such a result. As the Court of Appeals asked, and as it answered its own question (351 F. 2d at 257-8):

> "... Can it be sincerely believed that the public interest is better served by the discouraging of the negligence of tugboat operators than by the discouraging of negligence on the part of operators of public airports? We think not."

Therefore, even if this case comes within the *Southwestern* rule, and even if this Court were to give deference to the F.A.A.'s "approval" of the schedule of charges and the exculpatory clause as a purely economic matter, there can be no question that in the circumstances of this case public interest in safety is entitled to a higher consideration; and the decision below, invalidating the exculpatory clause, was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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